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Book Reviews

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BOOK REVIEWS

Handbook of the Law of Wills. By Thomas E. Atkinson.[1] West Publishing Company: St. Paul, Minn. 1937. Pp. vii, 916. $5.00.

This book is written primarily for students but lawyers will find it useful. It contains abundant citation to the periodical literature and to Page's excellent treatise. The author does not limit himself to the matter suggested by the title but in fact gives a valuable discussion of the history of succession, testate and intestate, the possible limitations upon succession, and will substitutes. He might well have included among the latter, the assignment, and especially the release of expectancies. The writer gives much the greater attention to the American cases, but he has by no means neglected the English authorities.

The author discusses and frequently rationalizes upon capacity, fraud, undue influence and mistake, execution, integration, revocation, republication, probate and will contests, grant of administration, and the management and distribution of the estate, etc. However, it is clear that there are numerous topics that require further exploration. Thus the author discusses wills conditional in form, illustrated by, "I am going on a journey . . . if I do not return the following is my will," and observes (pp. 364-365) that "the cases are irreconcilable and the authorities just mentioned (holding that such wills are truly conditional) can be matched by others where the will contained similar language and yet the provision was regarded as mere inducement." It seems clear that one must explore further if he would say anything of much usefulness on conditional wills. So also one must examine at greater length the matter of ademption of corporate stocks before such declarations as "changes of form, if not substantial, do not cause an ademption" can have great value. Further discussion of the nature of codicils, their relation to the preceding will, and the construction of them would be helpful. Very little is said about the powers and relations of co-executors. The matter of duplicate wills is handled with great brevity. These suggestions, however, are not in fact criticisms because the author did not intend a complete dogmatic exposition.

Two criticisms, however, do seem appropriate. The author has dealt with the most confused subject, "Dependent Relative Revocation," probably as well as it has yet been done, but one is tempted to believe that there is still room for improvement. To begin with, the

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black letter type (p. 386) scarcely describes the doctrine as it is understood, at least in England. Here it is said:

When a testator purports to revoke his will while laboring under a mistake of law or fact in connection therewith, the courts often declare that revocation is dependent upon the existence of the situation as believed by the testator and accordingly hold that the will is not revoked.

The true doctrine, however, does not imply merely that a situation exists with reference to which the testator has made a mistake. One should note that this concept includes both the term "dependent" and also the word "relative." Thus, it contemplates that an act has been done by the testator having relation to another act by him[2]—an act of destruction (of the allegedly revoked will) accompanied by the relative act of preparing or attempting to restore some other instrument to take its place. If no relative act has been done, then there is no dependent relative revocation. There may have been a revocation under a mistake (a sole act) to which the court may or may not give effect.[3] But, for the application of dependent relative revocation, a relative act is also required which imports the existence of a substitute for the prior will. The substitute is usually not validly executed, or is not so executed as to be operative. The relative act can scarcely be a substitute existing in contemplation only.

The author takes the view that dependent relative revocation is applicable to the cases where the alleged revocation is caused by a later instrument as well as to situations where it is accomplished by act to the document. This is not the view of the English writers. Both Williams and Jarman speak of dependent relative revocation as arising from an act of *destruction* (of the allegedly revoked will), accompanied by the relative act of preparing or attempting to restore some other instrument.[4] Is it not a better theory that, where the mistaken revocation is by subsequent instrument, there is necessarily a total revocation if the new instrument is validly executed and expressly revokes the former or is clearly inconsistent with it? If, however, the later instrument does not expressly revoke and is not clearly inconsistent, but is ineffective as a disposition, it would seem that the prior

[2] See I WILLIAMS, EXECUTORS (12th ed. 1930) 92.
[3] See I JARMAN, WILLS (7th ed. 1930) 132-33.
[4] See I JARMAN, WILLS (7th ed. 1930) 135 ("Where the act of *destruction* is connected with the making of another will so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition to be substituted, such will be the legal effect of the transaction"); I WILLIAMS, EXECUTORS (12th ed. 1930) (. . . "dependent relative revocation in which the act of *destroying* being done with reference to some other act, meant to be an effectual disposition, will be a revocation or not according to whether the relative act be efficacious or not").

will is not revoked. Thus, effect is given to the prior will because it remains unrevoked and dependent relative revocation is inapplicable.[5]

With respect to *re Fowles Will*[6] the author apparently adopts Professor Scott's view. In that case a testator bequeathed the residue of his estate to trustees upon trust to pay the income to his wife during her life and upon her death to pay a certain part of the principal pursuant to the provisions of such will as she might leave, and conferring upon her power to dispose thereof by will. He further provided that if he and his wife should die under such circumstances as to render it impossible to determine which predeceased the other, it should be deemed that he predeceased her and that his will should be construed on that basis. At the same time, the wife made a will reciting the power of appointment and undertaking to exercise it. They died in a common disaster. It was held that the property passed in accordance with the will of the wife. Professor Scott's[7] view is that the New York court abandoned its traditional position on incorporation by reference where the writing to be incorporated is the will of another. The difficulties of this view, however, seem insurmountable in this case because: (a) Incorporation by reference appears to be impossible where the incorporated writing is not in existence unless one avoids both physical laws as well as the legal rule; (b) The court does not purport to alter its traditional position but reaffirms it. "The rule against incorporation has not been set aside." (c) The court expressly refers the case to the principle applied in *re Piffard*,[8] which case Professor Scott apparently regards as being controlled by the principle of non-testamentary act.[9] Further, Mr. Justice Cardozo, who wrote the opinion, apparently never considered that the case involved a modification of the New York view of incorporation by reference.[10]

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Prisons and Beyond. By Sanford Bates. New York: The Macmillan Co. 1936. Pp. xii, 334. $3.50.

Some weeks ago Sanford Bates abandoned the headship of the Federal prison system and accepted the directorship of the Boys' Clubs

[5] See (1935) 23 KY. L. J. 559, 575; (1934) 22 KY. L. J. 469, 481.

[6] 222 N. Y. 222, 118 N. E. 611 (1918). See Atkinson, pp. 334-35.

[7] See Scott, *Trusts and the Statute of Wills* (1930) 43 HARV. L. REV. 521, 552-53 ("Although in New York the doctrine of incorporation by reference is rejected, it is not altogether rejected; indeed it was permitted in this case although the instrument which was incorporated was one which was not in existence at the time of the execution of the will.").

[8] 111 N. Y. 410, 18 N. E. 718 (1888).

[9] Scott, *supra* note 7, at 551.

[10] After Professor Scott's article appeared, Mr. Justice Cardozo so stated to this reviewer.

of America. He was turning, he said, from the punishment to the prevention of crime. These two aspects of the problem of crime are considered in two recent books: *Prisons and Beyond,* written by Mr. Bates, and *Preventing Crime,* edited by Sheldon[1] and Eleanor[2] Glueck. Both books come out of the experience of people on the job. For nearly twenty years (1918-1937) Mr. Bates served successively as Commissioner of Penal Institutions for the city of Boston, Commissioner of Correction for the State of Massachusetts, and Director of the Federal Bureau of Prisons. Mr. and Mrs. Glueck bring together the experience of many workers from many sections of the country on different phases of the crime prevention problem. Both books are valuable for workers in both fields.

The reader of *Prisons and Beyond* may pick up the book with astonishment at the thought of a prison warden as a leader of youth, and by the time he puts it down he will be even more astonished by the realization that the leadership of the Boys' Clubs of America is the logical outgrowth of interests, convictions, and policies developed in the penal institutions of city, state, and nation. Sanford Bates may not have been the only person in the city of Boston who, in the tumult and the shouting of Armistice Day in 1918, thought of letting four hundred Deer Island prisoners in on the celebration, but he was the one who did something about it, and he has been doing something about the prisons ever since. This book tells what he has been doing. It is a tale that ought to be told to every prison official in the nation. It will carry to the sentimentalist a sanity he sorely needs and to "practical" men a common sense that practice does not always give.

"The prison," says Mr. Bates at the outset, "has three purposes: to protect, to deter and to improve. It has succeeded in the first two: few men escape from prison, and most men fight not to go there and burst forth at the first opportunity. It is in the achievement of the third purpose that most prisons fall short of expectations." As he started out "to improve" prisoners he was accused of coddling them. One of the complaints came from a North Carolina County Board of Public Welfare:

> There have been a number of men from this county who have served terms in the Federal Penitentiary at Atlanta, Georgia. . . . Upon their return they invariably report good treatment and better food than they ever had in their lives and dilate upon the baseball games, moving picture shows and other entertainments arranged at the penitentiary. . . .

[1] Professor of Criminology, Harvard Law School; author of CRIME AND JUSTICE (1936).

[2] Author, with Sheldon Glueck, of 500 CRIMINAL CAREERS (1930); ONE THOUSAND JUVENILE DELINQUENTS (1934); FIVE HUNDRED DELINQUENT WOMEN (1934).

I feel that a term in the Federal penitentiary should be made less attractive to a class of men who are inclined to regard it as a vacation from family responsibilities.

But Mr. Bates was not interested in "coddling" prisoners. "The end and aim of a penal system," he says, "is the protection of society. . . . Our communities are entitled to protection. They are not entitled to vengeance." Society is undoubtedly "protected" from lawless and dangerous men while they are confined, and the confinement undoubtedly "deters" them from crime while the confinement lasts, but what becomes of this "protection" when prisons turn loose on society prisoners all the worse for prison wear? From this standpoint he examines and tests all his theories: of probation, prison labor, prison camps, individualization of punishment, parole, and prevention, with a wealth of concrete detail. When the protection of society can be obtained only by the permanent segregation of incorrigible and long term offenders, he does not flinch from that course and finds a place in his philosophy for Alcatraz penitentiary on twelve acres of rock in San Francisco bay with tool proof steel bars, tear gas outlets, automatic locking devices and gun detectors, guard towers, floodlights and gun galleries. When the protection of society may best be obtained by vocational and academic training calculated to reclaim novices in crime for useful citizenship, he finds a place in his philosophy for the United States Industrial Reformatory at Chillicothe.

As Mr. Bates looked "beyond" prison walls into the society to which the prisoners would return and shaped his prison policy to that end, so now he turns to look at the society from which the prisoners come and concludes that "the prison can never solve the crime problem. It touches only a trifling percentage of our lawbreakers. Crime will abate only as the people as a whole resolve to set up within themselves higher and more unselfish standards of conduct. Aiding in the carrying out of this resolve will be enlisted (1) a press more devoted to leadership and less to entertainment of its readers and profit for itself; (2) an organized neighborhood movement to co-ordinate social betterment projects; (3) an educational system that holds instruction in character to be paramount; (4) a spirit of sportsmanship that puts civic duty above personal advantage; (5) a modernized judicial procedure which seeks only to determine truth; (6) an economic order which affords equal opportunity for all but does not remove incentive to work; (7) a wise application of the truly scientific attitude motivated by altruism rather than self-aggrandizement; (8) a reincarnated religion which relates itself to the daily life of the people. With increasing emphasis in the years that are to come, others more eloquent than I will fling

the challenge of crime back to the community that tolerates it and demand its eradication at the source."

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Facing the Tax Problem. Vol I. Prepared under the auspices of the Committee on Taxation of the Twentieth Century Fund, Inc. New York: Twentieth Century Fund, Inc. 1937. Pp. xxiii, 606. $3.

The present volume is the product of co-operative research by a staff of persons especially experienced in the problems of the field of taxation, whose report was submitted to a Special Committee that used the materials as the basis for a report of its own. The major portion of the book is devoted to the report of the research staff. It includes brief descriptions of the principal features found in the tax systems of the federal government and of the several states, an appraisal of those systems by reference to postulated tax objectives, and the general conclusions and special recommendations of the staff members themselves. The balance of the book is devoted to the report of the Special Committee, and consists in large part of its criticisms of salient features of the systems described by the staff of experts, and recommendations for changes therein. It is probably correct to assume that the purpose of the entire study was to formulate this critical appraisal and series of recommendations, but it would be a grievous error for any reader to attempt to discover how the story ends without reading the excellent discussions that constitute its beginning.

It is inevitable that in a study of this character the description of the existing tax systems should be rather brief. It is not essential that the federal tax system and those of all the states should be described in detail. It is only necessary that they be sketched in broad outlines in order to set forth the major sources of revenue for those governments, to indicate the territorial distribution of important types of taxes, and to give a clear view of the relative importance of the various sources in furnishing governmental revenues. This has been done very successfully in the report of the research staff. There is an occasional inaccuracy caused by inadequate legal data or a failure to discern the precise legal situation, but it is perhaps rather remarkable that these occur as infrequently as they do. The research staff is concerned next with stating briefly the criteria by which it proposes to test the system it has described. These criteria are based upon the objectives which the staff thinks the system should seek to accomplish. It divides these into two groups, the primary and the secondary. Chief

among the primary criteria are the raising of revenues and social control, or the use of the taxing power to achieve certain objectives deemed for some reason or other socially desirable. The principal secondary standards are justice in distributing the tax burden, stability of revenue, ease of administration, and the relation of the system to the promotion of tax consciousness.

The major portion of that part of the book devoted to the report of the research staff is concerned with measuring the existing tax systems by these tests. It is, of course, quite beyond the purview of a review to go into this discussion in any detail. The discussion of a system from the point of view of its revenue possibilities shows a fine appreciation of the factors involved, at least so far as the federal tax system and fiscal policies are concerned. The general discussion of the use of taxation as an instrument of social and economic policy is followed by specific discussions of particular objectives, such as the promotion of particular industries, the control of consumption, and the change in the distribution of income and wealth. The principal part of the discussion of the secondary aims of taxation is concerned with the problem of tax justice, or the principles on which the tax burden should be distributed. An important feature of this is the attempt to determine how that burden is ultimately borne as distinct from how it is imposed in the first instance. The computations are made on several assumptions, which are clearly stated. The attempt is a most interesting one, but it would be exceedingly dangerous to misuse the results (as popular discussion may well do) by stating the results as definite findings instead of findings based on a series of assumptions, which, while not unreasonable in their general character, have not been verified so far as their quantitative aspects are concerned. There is one feature to which the writers direct attention that is frequently ignored. It is not unusual to discuss the justice of a particular tax on the assumption that it is an isolated thing rather than part of a given tax system. The authors state clearly that, in applying any test, the significant thing is not how a particular tax in the system scores but how the tax system scores as a whole. It should be remarked that the sections concerned with measuring the tax systems devote more discussion to the general principles and theories which direct attention to important factors in problems of that character than to their application to the facts of the existing system. The theoretical discussion, however, is of a high order, is more than worth while, and deserving of study by all who wish to acquire the basis for their own independent surveys of any given tax system.

The concluding chapter of the research staff's report sets forth its own general conclusions in a series of paragraphs. This review

can do no more than direct attention to a few of these, and recommend that the reader study them all for himself. There are some interesting recommendations as to the use of the taxing power as an instrument of social control. The reviewer finds himself in general agreement with them. It would be extremely valuable if a disinterested report of this character could effect a change of attitude in this field on the part of those who shape tax policies and programs. This is, perhaps, too much to hope for, particularly because some of the recommendations run counter to very strong currents of public opinion.

The concluding chapter of the book consists of the report of the Special Committee. This, also, is too compact and full of ideas to permit of exhaustive review. The reviewer, however, wishes to recommend those portions of the chapter that deal with suggested changes in federal income tax policy, with criticism of the existing federal tax on undistributed profits, with the treatment of capital gains and losses in an income tax, and with the taxation of excess profits. Likewise recommended is the analysis and criticism of the present federal policy of building up an enormous reserve fund in connection with its old-age benefit system.

In conclusion, the reviewer wishes to commend this volume to all interested in the tax problems that are upon us now, and are likely to continue with us for an indefinite future period. It contains in compact form an excellent analysis of theoretical and practical considerations entering into those problems. The points at which the reviewer might disagree are based on differences in ultimate assumptions, not on differences in reasoning from the same assumptions. It is to be greatly hoped that this study may engender a more intelligent grasp of tax problems by those who make our tax laws.

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Administration of Workmen's Compensation. By Walter F. Dodd.[1] New York: The Commonwealth Fund. 1936. Pp. xviii, 845. $4.50.

As a help to those who administer or participate in shaping Workmen's Compensation legislation, and not as a ready reference work for practicing lawyers—in other words, for what it purports to be—this seems a highly accurate and useful volume. That kind of work is what would be expected of the author. One might even in advance have borrowed from mercantile advertising slogans and guessed that "the name is a guaranty of excellence" in the book. Its amassing of

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factual detail[2] makes it in some sections about as thrilling reading as a census report—to which in some measure it is kin. But it is never guilty of piling up undigested and unweighed facts and figures for the reader to swallow or gulp at as best he can. Statistics from one state are always compared with those of another, or of many others, as a basis for cautious conclusions which will be the more readily accepted on that account.

The author offers no new philosophy or supposed new philosophy of Workmen's Compensation—nor was any to be expected—his task being to show how the well accepted theory of such legislation works under varying administrative organizations and methods. Review of so detailed a book of this character therefore becomes a matter of generalizations and selected samples.

At the outset a chapter is devoted to a brief historical outline of the common law background out of which compensation sprung—a thing perhaps needful for completeness even in a book addressed to mature students of the subject who *prima facie* know these things, but hardly worth encoring in abridgment at the opening of Chapter 3. From there on, however, one plunges directly into problems concerning the officers or bodies who administer the acts, the methods of administering them, the character and itinerary of appeals and the form, extent, and assurances of money and medical benefits.

If the author did nothing more by assembling the results of investigation and commentaries from scattered and often inaccessible sources than to show how far from perfect is the operation of Workmen's Compensation, how far it is necessary to settle questions of administrative policy by balancing one set of evils against another, he would have done a signal service. We have, of course, had suggestions of that sort from personal injury lawyers, but they came at a discount. Particularly good in this respect seems the chapter on medical benefits. Here are weighed the advantages of employer—that is, in effect, insurance company—selection of doctors against the greater disadvantages of that course. Here also are considered the corresponding advantages against the greater disadvantages of selection or control by employees, by medical associations, by the commissions themselves. The ultimate recommendation is a plan of checks and balances (p. 499). Judgments of this temperate sort abound.[3] Nor does the author make the mistake

[2] See, for example, elaborate consideration of office routine in connection with uncontested claims (p. 141) though perhaps this instance should not be singled out, as the entire book is built up from just such materials. While the author avoids long strings of state names in the text by use of footnotes, it seems that columns and tables might well have been used to a greater extent than they are.

[3] See p. 405 where the author appraises the gains both ways to be had from appeals to trial courts at the spot and at the state capitol, and pp. 520-525 on self-insurers.

of merely matching up figures or surface similarities to arrive at conclusions.[4] He is aware of differences, in industries, in classes of employers and employees, in administrative officers. A typical instance is where he appraises the system of advising employees of their rights by letter rather than by visit (p. 167). In the smaller and better educated employee groups of Wisconsin, for example, it may be a more adequate procedure than in the industrial masses of most of the seaboard states, though it is not apparent how being more "Americanized" is an important help to workers' appreciation of their rights under compensation laws, considering that we got our Workmen's Compensation from Europe.

If sometimes the author accepts from others contrasts which seem largely verbal,—distinctions between titles rather than duties of an officer, for example,[5]—he is not usually taken in by nomenclature. Witness his realistic observations on, and test of trials *de novo,* which as a matter of policy he rejects.[6]

In considering the uncertainties of compensation paid in installments over long periods, the author takes no notice of inflation, though he does give space to administrative procedures to guarantee the employee his compensation against failure of insurers. The former problem is no doubt beyond the scope of his undertaking as per preface, and it may be thought not germane because not peculiarly a compensation hazard. But it has administrative problems of sufficient magnitude to warrant consideration some time in that connection in addition to its essential importance in a field where dollar payments are admittedly, and perhaps for good cause, kept at bare existence levels.[7] We need not experience German degrees of inflation to pauperize the victims of past industrial accidents.

The author's statistical columns might well have been pushed forward into one additional territory. Some students feel that much commission and court effort is wasted in drawing the tenuous line be-

[4] Illustrated by his analysis of the number of judicial appeals in different states (pp. 384-396) and of the different geographic situations affecting employee choice of physician (p. 420).

[5] Pp. 106-108, reporting mechanical changes made in administrative reorganizations.

[6] "Although it has been held that a suit against the commission is not a trial *de novo,* because the commission exercises no judicial power and there has been no prior trial, the refusal to call it a *de novo* trial is a mere quibble over the definition of the phrase, the real question being whether the court trial is conducted on the commission's record or is a proceeding conducted independently of the commission's action." (P. 364). And see p. 100 on Separation of Powers.

[7] Subject to constitutional objections and actuarial difficulties, perhaps resolvable by federal aid, the matter might be handled by periodic revisals of awards in the light of new conditions or by adopting at the outset a sliding scale or fluctuating dollar standard, as, *e.g.,* the "commodity dollar." (If the employee had continued at work he would have shared dollar wage increases.). Either device would carry with it large administrative problems.

tween injury from accidents arising "out of the employment" and those which are only "in the course of the employment." Perhaps there would be net gains if the latter test were made effectually the only one, as it is literally, but ineffectually, in the language of some statutes. The author deals with the constitutional phases of the matter and with the tendency of courts to construe both types of statutes alike (pp. 682-689). Figures would be worth having, if they could be gotten, as to the number of appeals on the language of these clauses and as to the number of additional accidents which would have to be compensated if the broader language were used and given its full significance.

One local development which has large possibilities for upsetting the legislative wish to substitute compensation in appropriate cases for suits at law, came three months too late for inclusion in the present work. It is the North Carolina decision which makes possible speculative court proceedings for large damages without penalty for delay in taking action under the act.[8] It may well be that the statutes of other states are open to similar construction and corresponding abuse.

Most of what is said in this book has been said piecemeal before in a variety of places. The mere job of a thoroughgoing consolidation of that material would be a large and valuable one if nothing was added but some organization, an index and table of contents. But more has been added. The author not only reports appraisals, he makes them, and it would be a mistaken man or group who in the future offered proposed administrative amendments to compensation laws of more than a purely selfish character, or even purely selfish ones, without first consulting this volume.

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Studies in Federal Taxation. By Randolph E. Paul.[1] Chicago: Callaghan and Company. 1937. Pp. xxxiii, 341. $5.00.

Studies in Federal Taxation embraces three essays dealing with unrelated problems in the federal tax field, a lively introduction by Jerome Frank, and a somewhat extended preface by Mr. Paul. According to Mr. Paul, Mr. Frank's introduction states what Mr. Paul has done,

[8] Hanks v. So. P. U. Co., 210 N. C. 312, 186 S. E. 252 (1936); note 15 N. C. L. REV. 85. In the present volume the material on filing claims is somewhat erroneously, though for evident reasons, included in the topic "uncontested claims" at p. 132. No outright errors have been noted in the book. The classification of North Carolina in respect of notice (p. 126), while literally accurate, is misleading. So as to the failure to include North Carolina among those states giving the employee the right to choose his doctor (p. 413), though this is explained later (p. 420).

[1] Member of the New York Bar.

while Mr. Paul's preface tells what he has tried to do. Both introduction and preface become somewhat more intelligible after reading the book itself. Two of the essays, one of which appears also in the *Cornell Law Quarterly*,[2] are the products of the pen of Mr. Paul. The third was written by Mr. Paul in collaboration with Mr. Zimet.[3]

The second article, which is entitled "Realistic Valuation for Federal Tax Purposes," and the third, "Suggested Modifications of the Bad Debt Provision," are more or less (mainly more) orthodox discussions of the valuation of stock and the difficulties encountered in dealing with the federal income tax deduction for bad debts.

In "Realistic Valuation for Federal Tax Purposes," Messrs. Paul and Zimet point out that the depression has enhanced the difficulties inherent in valuing stock. Taking as their text the revelations of the recent Congressional investigations of stock market practices, the authors preach a forcible sermon on the iniquities of valuing stock on the basis of market quotations. Without attempting a definition of value, they give a fairly comprehensive specification of the factors which enter into the proper appraisal of stock. Although they do not evolve any self-executing formulae, they do point out the pertinent considerations, and to the extent that the problem permits, show how these factors should be weighted.

The essay on "Suggested Modifications of the Bad Debt Provision" is an excellent summary of the difficulties which have arisen in connection with this provision, with specific suggestions for eliminating some of them. Although the author's proposed amendments will not solve all the problems which have arisen in this direction—nothing short of a rule of thumb definition of when a bad debt becomes bad can do that —they should eliminate some of the incidental stresses and strains which are not inherent in the subject itself. Specifically, Mr. Paul suggests that Congress delete the requirement that a debt, to be deductible, must be "charged off within the taxable year," since this cannot be done by the taxpayer who does not keep books, nor by the taxpayer who does keep books but who cannot finally cast up his accounts until some time after the close of the taxable year. As Mr. Paul points out, the Courts have felt compelled to make exceptions in these cases so that the statutory language does not reflect the actual practice under the Act. Secondly, Mr. Paull advocates making an exception to the usual statute of limitations as far as the deduction of bad debts is concerned, so that errors may be adjusted with less pressure on both the government and the taxpayer. His other suggestions are to clarify the language of the statute so as to make it uniform with respect to debts which are partially

[2] (1937) 22 CORNELL L. Q. 196. [3] Member of the New York Bar.

and wholly worthless, and to delimit definitely the respective spheres of the bad debt deduction and the deduction for losses—a point of special significance in view of the present limitations on the deduction of capital losses.

The most amusing part of the book and the part which Mr. Frank seems to have had in mind when he described Mr. Paul's efforts as "gaily serious," is the first essay called a "Restatement of the Law of Tax Avoidance." The title is misleading. One might expect a summary and an exposition of the various ways to avoid taxes. However, this appears only obliquely from Mr. Paul's discussion. Methods of tax avoidance are mentioned, but they are not elaborated. What the author is seeking is a philosophy of tax avoidance. That at least is what he says he is seeking, although it appears to the reviewer that what he finds is an almost complete negation of any such philosophy, and the reviewer is by no means sure that this was not what he hoped to find. Like most of the realists Mr. Paul's work in this direction is consciously destructive. Its value is almost completely negative, as the author himself acknowledges. After enumerating a number of potential tax avoiding devices, some of which have succeeded and others of which have failed, the author points out that judicial formulae are mainly verbal props on which to support particular cases with little universal validity or applicability. Mr. Paul emphasizes the danger of taking judicial utterances at their face value, and the fact that tax avoidance is an emotional subject, where the motive of the avoider may be more influential with a court than is currently recognized. Somewhat to the chagrin of Mr. Frank, Mr. Paul attempts one positive piece of analysis in the shape of a distinction between questions of fact and questions of law in tax avoidance cases. Where the validity of a tax avoiding device turns upon a question of fact (or what Mr. Paul thinks is a question of fact), a court, says the author, will find that the facts for which the taxpayer contends exist, if he "means to live by what he has done." Taking Mr. Paul's test at its face value it is obvious that it requires a judgment about what the taxpayer "means" to do, about which there can be little real objectivity. In tax avoidance cases the courts are apt to find the facts, like the law, to be what they think they should be. Mr. Frank's criticism of Mr. Paul's effort in this direction seems justified.

There is a positive value to negation where that which is denied is untrue, which is conditioned, however, both by the importance of the untruth and the extent to which the untruth is given general credence. No lawyer can be oblivious to the necessity for a clear understanding of the judicial process which lies at the core of our legal system. An appraisal of Mr. Paul's work depends upon one's estimate of his pro-

fessional brethren. If courts and lawyers are really as naïve about the controlling considerations in tax avoidance cases as Mr. Paul seems to think they are, then by applying Mr. Frank's ideas to the specific field, he has performed a worthwhile service. One wonders, however, whether Mr. Paul, and for that matter Mr. Frank too, may not have underestimated the sophistication of their profession. Are they crusading against professional taboos and attitudes of mind which do not really exist in the type of lawyer who will read their books?

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Taxation and Public Policy. Edited by Paul Studenski. New York: Richard R. Smith. 1936. Pp. 267. $3.

Elaborated and expanded from a series of articles in *The Nation* in 1934-35, equipped with a brief foreword by the editors of that magazine, and edited by Paul Studenski, this book consists of twelve chapters on public finance topics, plus a lengthy appendix. The latter is composed primarily of selections from the testimony of Robert H. Jackson, then Assistant General Counsel of the U. S. Treasury Department, concerning the 1935 Revenue Act, before the Senate Finance Committee in August, 1935.

The editor accounts for three of the chapters, while the remaining nine are contributed one apiece by Frederick L. Bird, A. E. Buck, Gerhard Colm, Philip H. Cornick, Hugh Dalton, Clarence Heer, M. Slade Kendrick, John K. Norton, and William Withers. Professor Heer's contribution, written against the background of his work as Research Director for the Interstate Commission on Conflicting Taxation, deals with co-ordination of federal, state and local finance.

The purpose of the collection, according to the preface, is "to present a discussion of the taxation policies of modern governments as affected by their budgetary requirements and by the exigencies of a new economic situation." Further, "an attempt is made to indicate the nature of the changes in the present taxing policies which should be made in order to enable public authorities more effectively to discharge their responsibilities towards the nation and towards the local communities in a changing political and economic situation."

The topics discussed, in addition to Professor Heer's, include: a brief general survey of public finance in the world crisis; surveys of American federal, state and local finance and taxation, with a special piece on educational finance; a review of the State of U. S. municipal credit; an examination of depression public finance in Europe; dis-

cussions of the financing of past and (pleasant thought) future wars; and a summary chapter by the editor outlining a tax program for the future.

Obviously, in the brief space available, each individual topic is treated in a concentrated, summary fashion. However, perhaps the best idea of the character of the book as a whole can be obtained by examining the sweeping recommendations made by the editor in his concluding chapter.

It is suggested: that the government reduce its emergency expenditures while expanding its revenues, with the aim of a balanced budget in 1938; that there be no currency inflation; that the need for additional revenues be supplied by broadening the income tax base, by heavier taxation of corporations, by elimination of tax exemption for government bonds, and by sparing application of increases in indirect taxes; that inheritance taxes be geared to take any excess over a fixed sum ($5,000,000 being mentioned); that deflationary taxes, such as a sales tax increasing progressively with rises in the price level, or gross income taxes collected monthly at the source, be used if inflation begins to appear; that mortgage-interest taxes be imposed, beginning on interest over four per cent and taking nine-tenths of interest over six per cent, either to yield substantial revenue or force interest rates down; that some of the more socially desirable of the emergency expenditures be put on a permanent basis, and that expenditures for education, public health and similar objects be increased as soon as possible; that tax rates be kept high with returning prosperity in order to provide annual surpluses for debt retirement; that federal, state and local taxation, finance and functions be co-ordinated and integrated, with specific suggestions being made along this line, but with the main recommendation that the way be prepared by a series of comprehensive studies by staffs of experts.

These and similar recommendations indicate that the authors envision a thorough (and not so gradual) re-making of public finance in this country, coupled with a reorganization and improvement of administration in all levels of government. Increased centralization, through state-collected locally shared taxes, through increased state supervision over local budgets and credit operations, through regional commissions to develop intergovernmental unity, and through other devices, is regarded as a necessity. Such proposals as those dealing with death taxes and those recommending increased municipal ownership of utilities serve handily to differentiate the authors from the "economic royalists."

To the reader with the slightest interest in public finance the book is necessarily a cerebral stimulant. Its authors are much more at

home in the infinite complications of the present economic situation and much more confident as to the paths of economic righteousness than the reader is likely to be. Yet, if the reader is to be influenced, he will be led rather than browbeaten; and in the catholic recommendations he must necessarily find something to his taste.

If, as in the case of this reviewer, details, and statistical details in particular, are inclined to be elusive after a book is returned to the shelf, the memory will still be fresh that the authors are insistent that public finance should be Public Servant No. 1, and that tax policy, forsaking the plain raiment of revenue-raising, should be the primary instrument of social and economic change. Of course, implicit in this view is the idea that those controlling the tax policy for these purposes will agree with the authors as to the ends to be obtained. Appropriately, in this connection, the editor's concluding words are: "Instead of merely conforming with the changes occurring in the social order, taxation should induce them. Of all the peaceful means of bringing about a new social state, taxation is the most potent one. It should be used not merely as an expedient to raise revenue, but as a positive force for social reconstruction."

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Principles of Conflict of Laws. By George Wilfred Stumberg.[1] Chicago: The Foundation Press, Inc. 1937. Pp. xl, 441. $5.00.

Just ten years ago, Goodrich, *A Handbook on the Conflict of Laws,* was published, thus partly filling the need for an up-to-date American text on the subject. At that time, Minor's *Conflict of Laws or Private International Law* was twenty-five years old. Since then, the American Law Institute *Restatement of the Conflict of Laws* and Beale's three-volume treatise, written as a commentary on the *Restatement* by its chief author, have been published. Beale's work is indispensable and the debt owed to him is not forgotten. Yet Beale and the *Restatement* and Goodrich are founded on the much controverted "vested rights" theory of Conflict of Laws. They all tend to develop legalistically logical structures not always justified by what the courts do. Stumberg's short introduction shows the weaknesses of the fundamental assumptions of the "vested rights" theory. Here Cook's influence is clear, but the discussion and conclusions are Stumberg's. This is illustrated by the author's treatment of *Millikan v. Pratt.*[2] He gives just two pages of his introduction to the presentation and analysis of the

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[2] 125 Mass. 374, 28 Am. Rep. 241 (1878).

opposing viewpoints concerning this extensively discussed case, and he does it with completeness and clarity in such brief compass.

There is no slavishness in Stumberg. At times, he keeps step with Beale and the *Restatement*. Again, he joins the *Restatement* critics, Cook, Lorenzen, Yntema, and others. But always the reader is given reasons for the author's conclusions and solutions, and must be impressed that, in a book of only 441 pages, there can be so much emphasis and discussion of fundamental theory and policy.

In the chapter on Domicil, the logical treatment of that topic found in Beale and the *Restatement* is followed. Domicil is treated as a "unitary" concept, whereas the emphasis should always be functional and the question asked should be, "Domicil for what?" But from the viewpoint of pedagogy, as witness advance notices of the fourth edition of Lorenzen's Cases,[3] Domicil should be treated at one place. There is enough similarity in the principles developed in the Domicil cases to have them treated together, thus establishing a basis from which the exceptional cases may depart.

But if Stumberg is not functional in discussing Domicil, he is very objective in the chapters on Contracts and Torts. In the Contracts chapter, he presents the various theories for determining the validity of a contract, as developed by the courts—each for what it is worth. This might be carried further by investigating the value of the flexibility of decision attained by a court which has so many competing rules and principles to choose from in the solution of difficult cases.

Attention might be called to Stumberg's combined treatment of jurisdiction over foreign corporations and non-resident individuals. This appears to be sound. Where jurisdiction is based on service of process on a statutory agent, whose appointment involves no actual consent, a basis of jurisdiction is found in acts done within the state, whether by corporations or individuals. The real problem in these cases is one of Constitutional Law, i. e., whether the police power of the state may be exercised in respect to the kind of acts done, "doing business" in the case of corporations or driving on the state's highways in the case of non-resident motorists.[4] It is worth noting that the author recognizes the frequent impact of Constitutional Law on the Conflict cases, especially in the chapter on Legislative Jurisdiction.

The author has a facility for condensation and comprehensiveness. Moreover, the style is lively and interesting. Law students will certainly want the book. Where topics are not covered during a course, it affords an adequate supplement because it is genuinely analytical.

[3] The new fourth edition will contain a chapter on Domicil which was omitted in the third edition.

[4] See Bullington, *Jurisdiction over Foreign Corporations*, (1928) 6 N. C. L. REV. 147.

Practitioners should find the book useful for the same reasons. The volume contains full references to the *Restatement* and to L. R. A. and A. L. R. notes, which aim to take the place of exhaustive citation of cases.

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Trade Agreements and the Anti-Trust Laws. By Harry Aubrey Toulmin, Jr.[1] Cincinnati: The W. H. Anderson Company. 1937. Pp. xviii, 540. $7.50.

"When Moses mounted Mt. Sinai with his code of Ten Commandments," begins Mr. Toulmin's book, "he started the code making industry." If this statement were historically accurate, it would still be irrelevant. Reading it, one insists to oneself that the book cannot be as bad as that; but plodding through the succeeding pages one is forced to the conclusion that really it is. It is difficult to be fair, consequently, to the author's evident sincerity and earnestness or to the compendium of materials which his pages contain, albeit incomplete and badly arranged.

The volume is mainly concerned from a legal point of view with codes of fair practice and patent-licensing arrangements in relation to the anti-trust laws. Its purpose "is to tell the businessman what he can do as well as what he cannot do." That purpose is unfolded in a rambling text whose organization has only a remote relation to the chapter and section headings into which it is divided; which is filled with irrelevancies, inconsistencies, and inaccuracies; and which is unsupported by authorities for many of the statements which it contains. Not a single law review article is cited and most of the books which have appeared upon the subject are ignored.

As regards arrangement, it is true that codes and trade practice submittals are dealt with in the first part of the book, and that the Robinson-Patman Act is treated at the end. The latter subject, however, claims sections 9, 10, and 11 near the beginning, under the chapter heading, "What the Trade Practice Submittal Means to Business." Patent arrangements are covered in Part II, "Industrial and Trade Agreements," with a brief discussion of international cartels thrown in. Within the sections, incongruous material is frequently jumbled together. Thus section 6 refers in quick succession, under the heading "Early Attempts at Codes in the United States," to service clubs, trade associations, patent pools, price-fixing by patentees in connection with

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licenses to manufacture, the arrangements which govern Lloyds of London, the "need of this nation for spiritual regeneration in business fair play," and "the bitter fruits of living by the commercial knife." In Chapter V, misbranding is mentioned over and over in indistinguishable ways, under section headings which suggest related topics, such as deceptive practices. In section 31, price discrimination by absorption of freight charges is treated under the head of "Contracts," following sections which deal with good faith in the making and carrying out of contracts. Resale price maintenance is discussed in general terms in the chapter on patent pools and patent licenses (sections 106, 107). The treatment of the scope of interstate commerce awaits the discussion of the Robinson-Patman Act (section 124), with no analysis of the cases cited, which have arisen in many fields of regulation. Price-fixing of all sorts, governmental and private, is dealt with in a miscellany of material in section 63, which cites *United States* v. *Standard Oil Co.* and omits *United States* v. *Trenton Potteries Co.*

Inconsistencies appear frequently. On page 17, "the anti-trust laws have substantially emasculated business trade associations"; on page 21, trade associations can enforce "respectability" by publicity or penalties, or leave the offender to "the mercies of a government regulatory body." An encomium of the Supreme Court's patent decisions (p. 176) is partially offset (p. 186) by severe criticism of the cases which invalidate the attempted extension of patent monopolies to the supplies that are used with patented articles. The Robinson-Patman Act "has set up new problems of uncertainty for business men" on page 10; on page 236 it "puts certainty into the law of competition."

Inaccuracies are not lacking. The degree of assurance involved in Federal Trade Commission approval of trade practice submittals is overstated (pp. 10, 23, 27). It is alleged (p. 147) that "The only thing that the anti-trust laws prohibit [in regulation to price-fixing] is the fixing of a price at such a high and exorbitant point as to unreasonably restrain commerce and impose either upon competitors or customers." Apparently (p. 132) it is illegal for a "rich and powerful competitor" to attract the employees of a rival by "offering an increased salary or other compensation."

Naïve assumptions abound. There have been "only a very few violations" of 140 trade practice submittals since 1919 (p. 1). Doubtless it is *reported* violations which the author has in mind. "Spiritual regeneration" involves concern with the "soul" (p. 7). Statistics "obviously" cannot be employed for purposes of control (p. 89). "Public confidence is inspired" by sales at "cost plus a fair profit" (p. 92). Advertised goods "must live up to high quality" (p. 154). A resolution of the upholstery textile industry, forbidding misbranding with